No. 93-643

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BESSEMER & LAKE ERIE RAILROAD COMPANY,
Petitioner,

v.

REPUBLIC STEEL CORPORATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

In its petition, B&LE urged review by this Court of two vital issues concerning the proper construction of § 4 of the Clayton Act, *viz.*, whether rates filed in ICC-regulated tariffs can ever serve as the basis of antitrust injury asserted by shippers and competitors against a railroad and whether, contrary to the express holding of the Third Circuit below, the "indirect purchaser" rule is "a strict prohibition against recovery by indirect purchasers," Pet. App. 50a n.21. Contrary to the impression respondents Republic Steel Company, *et al.*, seek to create (Opp. 14), the questions presented are not "fact intensive." Respondents' recitation of the record below says something about their litigating style but nothing about each "question of law" that the court of appeals decided (Pet. App. 26a (*Keogh*); Pet. App. 42a (*Illinois Brick*)). Petitioner does not question in this Court any of the facts underlying the two central errors of law, and respondents' lengthy discussion of the facts cannot conceal the extraordinary holdings below that subject an antitrust defendant to liability in excess of $660 million even though two separate doctrines directly preclude the plaintiffs from establishing any "injury" within the meaning of the antitrust laws.

1. Respondents' attempt to distinguish this case from *Keogh* and *Square D* is unavailing. Although they repeatedly suggest that the district court eliminated rates and rate-related conduct from the trial of this case, respondents cannot escape the question decided below: "Does *Keogh* . . . preclude treble damage recovery for private litigants claiming . . . ICC-approved rates *played a role* in thwarting market entry[.]" Pet. App. 29a (emphasis added). Thus, whether rates were the sole cause of the damages claimed by respondents (as petitioner says), or were the primary cause (as the courts below found), or merely "played a role" (as Republic conceded below but disavows now), damages inflicted by tariff rates cannot, as a matter of law, constitute "injury" under § 4 of the Clayton Act. See Jt. Br. of Appellees 39; Pet. App. 29a.[1]

[1] Ambrosia's description (Opp. 5-6) of the conspiracy repeatedly identifies rate setting as a significant, if not the primary means, of

As both courts below found, the conspiracy was effectuated by two aspects of the rates agreed upon by the railroads:

> "[C]harging the same rate for unloading a self-unloader as for unloading a bulker" (*id* at 51a-66a) and
>
> "refusing to approve commodity line haul rates from private docks which would have handled self-unloaders [and thus leaving in effect higher class rates for such docks]" (*id.* at 51a).[2]

No amount of self-serving denial by respondents enables them to escape what the courts below found and accepted for purposes of deciding the legal issues: the means by which the conspiracy inflicted the injuries complained of were rates contained in tariffs filed with the ICC. See Pet. App. 51a & 93a-94a.[3]

Although the court of appeals steadfastly refused to use the term "rates" in its *Keogh* analysis, except in describing the question presented, it revealed the true nature of the case repeatedly when it described the facts generally and responded to petitioners' non-*Keogh* issues. See, *e.g.*, Pet. App. 18a (railroads "agreed to refuse to provide competitively-priced inland rail services, *i.e.*, to publish commodity line haul rates for moving ore from

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implementing the conspiracy. Of course, the disposition of the Wills' claims proves petitioner's argument that rates were the sole means of injuring respondents: Wills claimed injury only from the railroads' refusal to sell or lease dock property, and the jury awarded Wills only one dollar.

[2] To illustrate, respondent Erie complained that "refusal of a line-haul rate to Erie [of $5.01 per ton] was the same as a complete refusal of service" because the class rates of $13.20 for the same distance "were prohibitively expensive" (Erie Brief at 3 n.5).

[3] Respondents' reliance on *United States* v. *B&LE*, 717 F.2d 593 (D.C. Cir. 1983), is entirely misplaced. Because *Keogh* does not apply to criminal antitrust actions, the D.C. Circuit had no occasion to discuss the decision, nor any reason to focus on the extent to which the defendants effectuated their conspiracy through tariffed rates.

such docks"); *id.* at 51a (railroads "refus[ed] to approve commodity line haul rates from private docks which would have handled self-unloaders"); *id.* at 66a ("the railroads' refusal to alter their rates"); *id.* ("denial of competitive rates for inland rail transport from private docks").

In light of the rate-related nature of respondents' claims below, it is irrelevant whether their damages were or were not measured by reference to hypothetical railroad rates. *Keogh*'s fundamental holding—that the filed rate is the legal rate and so cannot cause antitrust injury—required that their treble damage claims be dismissed insofar as respondents relied on tariff rates, regardless of how respondents sought to measure their damages.[4] Indeed, in *Pinney Dock*, the Sixth Circuit rejected the essentially identical claim that *Keogh* applies only where the plaintiff seeks a "rebate," not where "plaintiffs claim damages for loss of business." 838 F.2d at 1455.

Finally, in *Square D*, this Court rejected the very same effort to limit *Keogh* to its facts that respondents make here. There, as here, plaintiffs alleged a conspiracy to eliminate competition that included non-rate activity, such as coercion, to foreclose independent action. In stark contrast to the court below, however, this Court held that, under *Keogh*, rates could not form the basis of any liability for treble damages and that all rate-related claims had to be excised from the case.

2. The suggestion by respondents and the court below that this case involved non-rate conduct that the Sixth Circuit deemed outside the scope of *Keogh* is demon-

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[4] Republic wrongly asserts (Opp. 25 n.17) that the Valentine Act claims are not implicated by the petition. *Keogh* bars state law claims as well as Sherman Act claims. *Mississippi Power & Light Co.* v. *Mississippi*, 487 U.S. 354, 371 (1988). Thus, reversal on *Keogh* would affect all of respondents' claims—state and federal. Moreover, the district court specifically held that the Valentine Act claims were dependent upon *Illinois Brick*. J.A. 2349. Thus, if the Court holds the federal claims barred, the district court will vacate the state claims as well.

strably wrong. As noted, the "boycotts" and "refusals to deal" that respondents and the court below describe for purposes of their *Keogh* analyses were in fact offers to provide and the actual provision of services under tariffed rates that respondents claim were too high. The Sixth Circuit very explicitly held that "boycotts" and "refusals to deal" of this nature fall *within Keogh*'s bar.[5] In *Pinney Dock*, the Sixth Circuit noted plaintiffs' contention "that defendants refused to handle self-unloading vessels at docks owned or operated by defendants and that defendants boycotted Pinney Dock," and explained that, "*if this boycott or refusal to deal took the form of assessing higher rates and charges, it would again appear that these claims are within the scope of Keogh.*" 838 F.2d at 1457-58 (emphasis added).

The fact that the procedural posture of this case, which went to full trial, is different from that in *Pinney Dock*, where the Sixth Circuit reviewed a summary judgment decision, is irrelevant.[6] Not only were the courts in both cases required to view the evidence favorably to the antitrust plaintiffs, but here, as the Third Circuit itself elsewhere acknowledged, the evidence at trial *confirmed* that the alleged "boycotts" and "refusals to deal" took the

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[5] Respondents' reliance on the jury instruction that precluded measuring damages solely on the basis of excessive rates does not undermine the *Keogh* issue; to the contrary, it graphically reveals the difference between the *Pinney Dock* holding and the decision below. The whole point of *Pinney Dock* was that antitrust plaintiffs cannot simply reframe their rate-based claims in "boycott" terminology and recover under *Keogh*. Here, the jury was instructed that jointly setting rates is a boycott and that boycotts are illegal under the antitrust laws. That jury instruction is manifestly invalid under *Pinney Dock*.

[6] The interlocutory posture of the case is, however, very relevant to why the Court did not grant certiorari in *Pinney Dock*. Moreover, the prediction made by the respondents then that these issues would not recur was obviously mistaken, as this case, *Lifschultz*, the RICO cases cited in the petition (at 19 n.12), the price squeeze cases cited in the petition (*id.* at n.13), and the *amicus* participation of the AAR and the NMFTA plainly reveal.

form of assessing higher rates. The conflict between the decisions of the Third and Sixth Circuits, therefore, could not be starker. The recent decision in *Lifschultz* merely reinforces the need for review of this issue.

3. Recognizing that the decision below conflicts directly with the Sixth Circuit's holding that *Keogh* applies to competitor claims, respondents attempt to dismiss *Pinney Dock* as wrong. This attempt to cast the decision in *Pinney Dock* as an outlier is utterly mistaken. Except for the decision below, the "weight of authority" respondents cite all pre-dates this Court's express affirmation of *Keogh* in *Square D*. Since that time, three courts have addressed the question whether *Keogh* applies to competitor claims. Two have concluded that it does; only the court below has held that it does not.

The Sixth Circuit's decision is correct. *Keogh*'s and *Square D*'s rationale is in no way limited to shipper claims. To the contrary, this Court explained that it is the Interstate Commerce Act, not the antitrust laws, that determines whether an ICC-regulated rate is legal or not. There is thus no reason to limit *Keogh* to shippers, particularly in view of the fact that competitors as well as shippers can challenge rates before the ICC and, if successful, can recover damages. In fact, limiting *Keogh* to shippers would pervert the purpose of the antitrust laws by providing greater protection to competitors than to customers, who are the intended beneficiaries of the competition the antitrust laws are designed to promote.

In refusing to follow the decision in *Pinney Dock*, the Third Circuit did not address any of the policy reasons the Sixth Circuit identified for applying *Keogh* to competitor claims, and instead limited itself to disagreeing with the Sixth Circuit's reading of *Georgia*. See Pet. App. 36a-37a n.6. Respondents' contention that the Third Circuit's reading is correct ignores a more fundamental point: the very fact that two courts of appeals have read a decision of this Court in support of diametrically opposed results in connection with identical facts underscores the need for review and clarification of the law.

4. As petitioner has previously explained, notwithstanding passage of the Staggers Act, substantial rail and trucking traffic continues to move pursuant to tariffs on file with the ICC. Indeed, for that reason, organizations representing both of these industries have filed *amicus* briefs urging this Court to review the decision below. Moreover, respondents themselves acknowledged in their pleadings below that "*Keogh* has consistently been a guide to analysis in a broad array of regulatory regimes," including those established by the Federal Communications Act and the Federal Power Act. Jt. Br. of Appellees 47 & n.31. Thus, respondents' self-serving assertion that the problem addressed by *Keogh* will not arise in the future provides no basis for the Court to ignore the conflict in the circuits on this important issue.[7]

5. Respondents make virtually no effort to defend the holdings of the court of appeals that *Illinois Brick* has been superseded by *AGC* and that *Utilicorp* can be "discount[ed]" as a mere public utility case. Indeed, respondents do not challenge the fact that the steel companies were awarded $414 million solely on the pass-on theory that, but for the conspiracy, the steel companies would have paid less to *vessel* companies for *lake* freight transportation than they in fact paid to vessel companies. Even the court of appeals recognized that the steel companies were indirect purchasers as to these damages. See Pet. 6-7; Pet. App. 50a. The harm to the indirect purchaser rule is manifest and uncontested.

Instead of addressing their status as indirect purchasers, respondents assert that *Illinois Brick* does not apply to

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[7] Nor is it true, as Republic asserts (Opp. 21) that the Staggers Act significantly undermines the rationale of *Keogh*. This Court rejected precisely this argument in *Square D*, where the Government urged that *Keogh* be expressly overruled. The fact that, within the past five terms, this Court has granted review in no fewer than three cases involving the filed rate doctrine (of which *Keogh* is a part) underscores the doctrine's continuing vitality. *See Security Serv., Inc.* v. *K Mart Corp.*, No. 93-284 (*cert. granted*, Oct. 18, 1993); *Reiter* v. *Cooper*, 113 S. Ct. 1213 (1993); *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116 (1990).

dock handling damages in this case because the steel companies—"as indirect purchasers of the railroads"—were directly injured by the railroads' conspiracy. Republic Opp. 25-26. In making this argument, respondents are playing a shell game. Thus, in an effort to escape *Keogh/Square D*, respondents characterize the railroads' conduct as a refusal to deal and a boycott in order to obscure that this is a rate case. Then, when trying to escape the *Illinois Brick* prohibition on pass-through damages, respondents flip their position by claiming that they were directly injured because they were forced to pay excessive dock handling rates to the railroads.

The steel company respondents' pass-through damage theory concocted to evade *Keogh* runs them square into *Illinois Brick*.[8] Only by ignoring the *Keogh* problem can respondents argue that this is a case, like *Blue Shield* v. *McCready*, 457 U.S. 465 (1982), where more than one party suffered direct injury, and so is distinguishable from *Illinois Brick*. Not only is the respondents' reliance on *Blue Shield* v. *McCready* misplaced, it actually illustrates why the steel companies' claims are indirect. In *McCready*, the Court held that *Illinois Brick* did not bar the damages claim of a subscriber against Blue Shield because "her injury consists of Blue Shield's failure to pay her." 457 U.S. at 475. Because plaintiff was seeking to recover for funds owed and payable to her directly by Blue Cross, there "was not the slightest possibility of a duplicative exaction from petitioners." *Id.*

Here, by contrast, the only injury for which the steel companies have been awarded damages are for savings

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[8] *See* Republic Opp. App. 17a-18a: "I also note my firm belief that these damages are actually claims for overcharge in other clothing. Although plaintiffs claim to be seeking recovery for 'lost savings,' this is only an exercise in semantics. What plaintiffs actually seek is reimbursement for the inflated rates they suffered as a result of defendants' predatory practices; while this brings plaintiffs out from under the constraints of *Illinois Brick* (i.e., they are no longer indirect potential purchasers), it runs them squarely into the brick wall of *Keogh*."

lost from transactions with non-parties. It is obvious that —absent the kind of massive proceeding with mandatory joinder of parties and complex apportionment that *Illinois Brick* condemned—there is no way to prevent an overlap between the lost "savings" that the steel companies claim the vessel and dock companies would have passed on to them, and the "lost profits" that the dock and vessel companies have claimed they would keep for themselves. Because the possibility for duplicative damages is "real" (Pet. App. 52a), it is *Illinois Brick*, and not *McCready*, that controls.[9]

Finally, there is no merit in respondents' related claim that, if *Illinois Brick* is applied to bar their damages, then "no injured party has standing to sue." Republic Opp. 27. As respondents elsewhere admit, *Illinois Brick* does not stand as a bar to the claims of competitors—vessel and dock companies—who can and have claimed lost profits from being denied the opportunity to participate in a transportation system based on self-unloaders. See Pet. 23-24 & n.15. Petitioner's point is simply that the steel companies should not be permitted to escape *Keogh* by concocting damages theories in their capacity as purchaser of services from non-railroad entities.

6. Respondents also assert that the court of appeals held only that *Illinois Brick* was inapplicable to these facts, not that the need to show antitrust injury under *Illinois Brick* has been superseded by the standing analysis of *AGC*. Republic Opp. 27; Ambrosia Opp. 27. What-

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[9] Contrary to respondents' argument (Republic Opp. 24), the Sixth Circuit did not hold in *Pinney Dock* that the steel companies were the directly injured parties for purposes of the lost savings damages at issue here. There, the court of appeals held only that the vessel and dock company plaintiffs lacked standing under *AGC* to pursue some of their rate-related claims because—as to *those* claims—the steel companies were more directly injured. 838 F.2d at 1462-64. The court of appeals *permitted* the vessel and dock companies to proceed on their other claims, *including* the claim that they lost profits as a result of the delay in the introduction of self-unloaders. *Id.* at 1452, 1465.

ever else may be said about the decision below, there is no question that the court of appeals recognized that the steel companies sought relief as "indirect purchasers" but refused to apply *Illinois Brick* to them:

> We agree with the district court and B&LE that the steel companies, in respect to lake transport damages, are, in some sense, "indirect" purchasers. Although B&LE suggests that indirect purchaser status is the death knell of plaintiffs' claims, this conclusion is not supported by the current law. We are, instead, instructed by *AGC* to ascertain the nature of the relationship between the parties.

Pet. App. 50a; see also *id.* at 50a n.21. Thus, although the Third Circuit conceded that the steel companies sought relief as indirect purchasers, it simply declined *as a matter of law* to consider, under *Illinois Brick*, whether respondents had suffered antitrust injury; instead, the court held that respondents needed only to establish standing under *AGC*. *Id.*; see also Pet. App. 48a. The decision below thus squarely puts in issue the continuing vitality of the *Illinois Brick* ban on recovery of treble damages by indirect purchasers and the question of whether *Utilicorp*'s flat ban on indirect purchaser claims can be "discount[ed]" as limited to "the public utility arena." Pet. App. 50a n.21. The Third Circuit's conclusion that standing analysis under *AGC* has superseded the need to show antitrust injury should be reviewed by this Court because it conflicts with other appellate decisions and exacerbates the "great deal of confusion" in the courts of appeals over the relationship between standing and antitrust injury. *Greater Rockford Energy & Technology* v. *Standard Oil Co.*, 988 F.2d 391, 394-95 (7th Cir. 1993). Respondents do not even address this conflict.

This case illustrates why a standing analysis is no substitute for a determination whether plaintiff is seeking treble damages for antitrust injury. In requiring courts to balance several factors, *AGC* provides courts with substantial discretion to determine standing once an antitrust injury has been found; by contrast, *Illinois Brick* and

Utilicorp establish a bright-line rule that plaintiffs may not recover treble damages for injuries suffered as indirect purchasers. See Pet. 20-22.[10] By considering the *Illinois Brick* "concerns" only as part of a multi-factor balancing analysis, the court of appeals was able to "balance away" facts that demonstrate that the steel companies recovered damages only as indirect purchasers. See Pet. 28-30.[11]

Contrary to respondents' assertion (Ambrosia Opp. 26), courts have repeatedly applied *Illinois Brick* to bar claims for recovery of savings that a party other than defendant would have provided. For example, the conflict with *Laurel Sand & Gravel, Inc.* v. *CSX Transp., Inc.*, 924 F.2d 539, 544 (4th Cir. 1991), a case that none of the respondents even cite, is stark because there the court refused to allow a shipper to recover lost savings that a (co-plaintiff) rail carrier allegedly would have passed on if the defendant had granted that carrier trackage rights. Review by this Court is therefore warranted to resolve that conflict plus the conflict with this Court's decisions in *Illinois Brick* and *Utilicorp*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[10] Respondents contend that each of them zealously avoided presenting overlapping damage claims, but they ignore completely the overlap between their claims and those of Pinney Dock and the Litton vessel company at issue in the Sixth Circuit. Respondents make no effort to defend the court of appeals' holding that the hypothetical ability to avoid duplication of recovery is sufficient to ignore *Illinois Brick*. That silence is telling; the holding below clearly violates the core purpose of the indirect purchaser rule of avoiding complex and overlapping recoveries in private antitrust cases. *See* Pet. 23 & n.14.

[11] Respondents halfheartedly assert that the court of appeals preserved an alternative ground for affirmance of the district court's ruling that the steel companies would have entered the market for self-unloaders. In fact, as the court of appeals made plain, the district court's "preparedness" theory cannot serve as an alternative ground because there is no evidence in the record, nor is there a jury instruction, that supports such a theory. Pet. App. 44a n.15.

Respectfully submitted,

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